RE CHEONG AH MOI, EX P CNLT (FAR EAST) BHD

HIGH COURT MALAYA, MUAR
JEFFREY TAN J
[BANKRUPTCY NO: 29-298-1998]
14 MARCH 2000

BANKRUPTCY: *Notice - Substituted service - Substituted service effected by advertisement in newspaper - Whether should be effected based on ethnic background of judgment debtors by advertisement in vernacular newspaper*

BANKRUPTCY: *Notice - Substituted service - Order for substituted service - Validity - Whether validity could be challenged collaterally in proceedings*

The judgment debtors appealed against the decision of the senior assistant registrar ('SAR') dismissing their respective applications to set aside the receiving order and adjudicating order made against them. The judgment debtors contended that the orders for substituted service of the bankruptcy notice or creditor's petition were not in order. This was because the orders for substituted service failed to specify the newspaper for advertisement of the bankruptcy notices and petitions. Also, that the said advertisement should have been in a Chinese newspaper as the judgment debtors were of Chinese descent.

Held:

[1] The order for substituted service can only be challenged as regards its validity by having it set aside by proceedings instituted for the very purpose of challenging its validity. It cannot be challenged collaterally in any proceedings as regards its validity.

[2] There was no rule to the effect that any substituted service to be effected by advertisement in a newspaper must be effected because of the ethnic background of the person concerned by advertisement in a vernacular newspaper.

[3] The SAR who had the wide discretion to order the manner in which the substituted service should be effected, thought it fit to order advertisement of the bankruptcy notices and creditors' petition "in any one issue of any daily newspaper". Perhaps a newspaper ought to have been specified. But without proceedings instituted for the very purpose of challenging its validity, the orders for substituted service cannot be challenged collaterally in these appeals.

[Appeals dismissed with costs.]

Case(s) referred to:
Aw Chen v. Johannes Koplan [1969] 2 MLJ 190 ***(refd)***
Development & Commercial Bank Berhad v. Aspatra Corporation Sdn Bhd & Anor [1996] 1 CLJ 141 ***(refd)***
Low Mun v. Chung Khiaw Bank Ltd [1987] 2 CLJ 400 ***(refd)***
Re S Nirmala Mutiah Selvarajah, ex p The New Straits Times Press (Malaysia) Berhad [1987] 1 CLJ 413 ***(refd)***

Legislation referred to:
Bankruptcy Rules 1969, rr. 97, 109, 110

Other source(s) referred to:
Halsbury's Laws of Malaysia, vol 1, para 10.2-050

For the appellant - Faizal Abu Bakar; M/s Bala & Co
For the respondent - K Maniam; M/s Skrine & Co

Reported by Usha Thiagarajah

JUDGMENT

Jeffrey Tan J:

These are two similar appeals – to judge-in-chambers, by two judgment debtors (the abovenamed Cheong Ah Moi and See Wee Hong) against the decision of 23 November 1999 of the learned senior assistant registrar dismissing their respective applications to set aside the receiving order and adjudication order made by the learned SAR against them on 20 July 1999 – heard together on the application of the parties.

Both appeals arose from the same set of facts. On 3 October 1997, in Johore Baru High Court 22-208-1994, Mohd. Ghazali bin Mohd Yusoff J ordered the defendants (namely the abovenamed Cheong Ah Moi, See Wee Hong and two others) to pay the plaintiff (namely the abovenamed CNLT (Far East) Berhad) the sum of RM478,118.49 together with interest at the rate of 8% per annum from 15 June 1994 to date of satisfaction. In these proceedings, bankruptcy notices were issued against Cheong Ah Moi and See Wee Hong on 24 March 1998, and creditor's petitions were presented against Cheong Ah Moi and See Wee Hong on 13 October 1998. All bankruptcy notices and creditor's petitions were served respectively on Cheong Ah Moi and See Wee Hong by way of substituted service.

But Mr Faizal Abu Bakar contended for the judgment debtors, that the orders for substituted service, of the bankruptcy notice or creditor's petition, were not in order ("tidak teratur, tidak sempurna"). "The orders for substituted service failed to specify the newspaper ... Walau BN dan petition ada diiklankan, tetapi tidak diiklankan dalam surat khabar Cina." Mr Maniam for

CNLT riposted however that service was effected in accordance with the orders for substituted service, and that there was no requirement for the publication of notices to be in vernacular newspapers.

A bankruptcy notice is served in the like manner as the service of a creditor's petition; r. 97 of the Bankruptcy Rules 1969 (Rules) provides:

> A bankruptcy notice shall be served and service thereof shall be proved in the like manner as is by these Rules prescribed for the service of a creditor's petition.

The Rules prescribe that a bankruptcy notice or creditor's petition shall be personally served, by delivering a sealed copy of the bankruptcy notice or creditor's petition to the debtor (r. 109). However, "if a court is satisfied by affidavit or other evidence on oath that prompt personal service cannot be effected because the debtor is keeping out of the way to avoid service of the petition or any legal process or for any other cause it may order substituted service to be effected in such manner as it thinks fit" (r. 110).

In determining whether or not to make an order for substituted service, "the primary consideration which weighs with the court is as to how the matter can best be brought to the personal attention of the person in question" (*Aw Chen v. Johannes Koplan* [1969] 2 MLJ 190 per Chang Min Tat J, as he then was). "Under r. 110 read with r. 97 ... the Bankruptcy Court has a wide discretion to order the manner in which the substituted service should be effected" (*Low Mun @ Low Sian Sun v. Chung Khiaw Bank Ltd* [1987] 2 CLJ 400 per Mohd. Azmi SCJ). "Substituted service may take the form of service by post addressed to the (debtor) at a specified address or by service on some person other than the (debtor) or by advertisement in a newspaper" (*Halsbury's Laws of Malaysia*, vol. 1 para 10.2-050). And the order for substituted service "can only be challenged as regards its validity by the only way of having it set aside by proceedings instituted for the very purpose ... . It cannot be challenged thus collaterally in any proceedings as regards its validity ... "(*Development & Commercial Bank Berhad v. Aspatra Corporation Sdn. Bhd. & Anor* [1996] 1 CLJ 141 per Peh Swee Chin FCJ).

In the present case, the learned SAR ordered service of the bankruptcy notices, creditor's petitions and orders for substituted service to be effected by posting copies of the bankruptcy notices and creditor's petitions on the notice board of the High Court, Muar, and also on a conspicuous part of premises known as 128 & 129, Jalan Dato' Wan Idris, Taman Miri, Batu Pahat, 83000 Johore Darul Taksim, the last known address of the judgment debtors, and, by advertising the bankruptcy notices and creditor's petitions "in any one issue of any daily newspaper". Unlike *Re S Nirmala Mutiah Selvarajah, ex p The New Straits Times Press (Malaysia) Berhad* [1987] 1 CLJ 413, it was not

specifically ordered that the bankruptcy notices and creditor's petitions be advertised in a vernacular newspaper. Both could be advertised "in any one issue of any daily newspaper". And according to the orders for substituted service, the posting and advertisement of the bankruptcy notices and creditor's petitions "in any one issue of any daily newspaper" shall be deemed good and sufficient service. Consequently, the postings, and the advertisements in the Star Publications (a daily newspaper), all done in accordance with the orders for substituted service, was good and sufficient service. All orders say so. In any event, those orders are still valid and binding, and it is plainly futile to contend that the orders were not in order. That contention is really milk and water.

With respect, the learned SAR had a discretion to order or not the advertisement of the matter in a vernacular newspaper. Both judgment debtors, admittedly, were of Chinese descent. But there was no rule - *Re S Nirmala* did not propose so – to the effect that any substituted service to be effected by advertisement in a newspaper, must be effected, because of the ethnic background of the person concerned, by advertisement in a vernacular newspaper. *Re S Nirmala* was but an instance where on the facts and circumstances of the case the court thought it fit, to order advertisement in a vernacular newspaper. In the present case, the learned SAR who had the same wide discretion to order the manner in which the substituted service should be effected, thought it fit, to order advertisement of the bankruptcy notices and creditor's petitions "in any one issue of any daily newspaper". Maybe, a newspaper ought to have been specified. But without proceedings instituted for the very purpose of challenging its validity, the orders for substituted service "cannot be challenged ... collaterally in (these appeals to judge-in-chambers)" (*Development & Commercial Bank Berhad v. Aspatra Corporation Sdn. Bhd. & Anor*). Both appeals cannot succeed, and for the reasons given herein are dismissed with costs.